Supreme Court, U.S.
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NO. 93-1676

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

RITA FULLER, BABBETTE THAYER, THOMAS WILSON, and the class of similarly situated persons who have worked aboard the **F/T MICHELLE IRENE,**

Petitioners,

vs.

GOLDEN AGE FISHERIES; SIMONSON ENTERPRISES V, INC.; MICHELLE IRENE JOINT VENTURE; WESTCOD II, INC.; BTI IV, INC.; et al.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE CASE

I. Nature of the Case and Proceedings Below

All of plaintiffs' claims were dismissed by summary judgment entered by the United States District Court for the Western District of Washington. The district court was unanimously affirmed by the United States Court of Appeals for the Ninth Circuit. Certiorari is not appropriate because this case does not present any important question of federal law, and the Ninth Circuit decision is not in conflict with the controlling decisions of this Court or of any other court of appeals.

Plaintiffs, Rita Fuller, Babbette Thayer, and Thomas Wilson, worked aboard the fishing vessel F/T Michelle Irene (the "Vessel") at various times between September 23, 1989 and November 21, 1990. On October 6, 1991, plaintiffs brought this suit as a class action against the defendants.[1] Plaintiffs' pay was based on a share of the estimated value of the Vessel's catch. Plaintiffs contend that they were

[1] This brief is filed on behalf of defendants Golden Age Fisheries; Simonson Enterprises V, Inc.; Simonson Investments, Inc.; and Stanley and Rebecca Simonson. Simonson Enterprises V, Inc. and Simonson Investments, Inc. were Washington corporations. Since the filing of this lawsuit, these two corporations have been merged into a successor corporation, Simonson Enterprises IV, Inc. Simonson Enterprises IV, Inc. has no parent company and no corporate subsidiaries.

underpaid because defendants underestimated the value of the catch, and because the owners paid some of the plaintiffs' share to other crew members not entitled to a share.

Plaintiffs worked pursuant to written employment contracts, which provided a six-month time limit for the assertion of all claims. Because plaintiffs did not raise their claims or bring suit within six months, the district court granted summary judgment, dismissing all of plaintiffs' in personam and in rem claims. The court ruled that plaintiffs' in rem claims were also barred by the six-month limitation imposed by 46 U.S.C. § 10602(a). The Ninth Circuit Court of Appeals affirmed the district court.[2]

II. Statement of Facts Relevant to the Issues Presented for Review

A. Background

Plaintiffs' employment contracts were for terms of approximately 90 days, covering several successive trips. Every plaintiff signed an employment contract or contracts containing the six-month clause.[3] It is undisputed that all of

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[2] Plaintiffs' Alaska state law claims were also dismissed on summary judgment. These claims are no longer at issue, since plaintiffs do not seek review of the dismissal of these claims.

[3] At some point during the period at issue in this case, defendants modified the employment contracts used with crew members. Thus, depending on when and how long they were employed by the defendants, plaintiffs signed one of two different versions, or both, of the

the six-month limitation periods set forth in the employment contracts had expired when plaintiffs filed this lawsuit. It is also undisputed that no plaintiff made a written claim of any kind against defendants prior to the end of the six-month limitation periods.

After each of the Vessel's trips, the fish were off-loaded, usually in an Alaskan port. The bulk of the fish product was shipped from Alaska to Japan, where it was sold by a commission sales broker. Typically, the fish were sold a few months after the end of each trip. Fish caught on the Vessel during the voyages at issue were sold by January 31, 1991, over eight months before the filing of this lawsuit.

B. The Crew Members Had Ample Opportunity to Review the Six-Month Limitation Provision in Their Contracts

Plaintiffs have mischaracterized the facts surrounding the signing of the employment contracts, making a number of selective omissions in their description of the contract signing process. There was no trickery or coercion involved in this process. To the contrary, defendants made every reasonable effort to explain the provisions of the crew member agreements to the crew before the agreements were signed. Every plaintiff either read, or had the opportunity to read, his or her employment contract prior to its signing. In fact, every

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limitation clauses. See Plaintiffs' Petition for Writ of Certiorari ("Plaintiffs' Petition") at 12.

named plaintiff signed a number of employment contracts, each containing the limitation clause.

The limitation clauses were not hidden in fine print. In easily understandable language, the clauses stated that written claims regarding the employment contract, including legal actions, must be filed within six months.

Typically, new crew members attended an orientation session during which the entire contract was reviewed clause by clause. Crew members were encouraged to ask questions. After the orientation session, crew members met individually with a personnel staff member to sign the contracts. Crew members were then usually offered a copy of their contracts.

Plaintiff Thayer recalled attending at least one orientation session, and acknowledged that she had time to read each of her three employment contracts prior to signing them. She also testified that, although she had the opportunity to ask questions, she did not do so.

Plaintiff Wilson first began work for defendant Golden Age Fisheries on the F/T Browns Point, another fish processing vessel. The Browns Point employment contract contained a limitation clause identical to the provision in the Vessel contracts. Wilson attended an orientation session in connection with the signing of his first contract. At this session, Golden Age Fisheries personnel reviewed the contract's provisions with him. Although he chose not to do so, it is undisputed that Wilson always had the opportunity to

read his contract.[4] In fact, Wilson took a copy of his second contract on the Browns Point with him, and had it reviewed by his father, a Washington state superior court judge.

Plaintiff Fuller acknowledged at her deposition that she read her contracts before signing them.

In addition to the opportunity to review the limitation clauses, plaintiffs had the ability to understand the clauses' meaning. Plaintiffs are competent, educated individuals. Thayer attended high school and obtained her high school general equivalency diploma. Fuller graduated from high school and attended college. Wilson graduated from high school and attended two years of community college, concentrating in pre-med studies.

Finally, plaintiffs were well compensated for the difficult work they performed on board the Vessel, making a significant amount of money in a short period of time. During the period of time covered by this litigation, Fuller earned over $19,118 in just 95 days of work; Wilson earned $7,870 in 58 days; and Thayer earned $28,505 in 240 days.

C. Plaintiffs Were Paid Their Full Crewshares

Whether or not plaintiffs received their entire wages is not relevant to this review. However, plaintiffs' assertion that they did not receive their full wages is without foundation.

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[4] Wilson also conceded at his deposition that the limitation clause was readily understandable.

Under the employment contracts, the crew members were paid shares of the estimated fair market value of the Vessel's product. The use of an estimate was necessary because, pursuant to their contracts, the crew members were paid within two to four weeks after each trip, while the fish from each trip were sold months later in Japan.

The owners of the Vessel were paid a provisional settlement by the commission sales broker at the time the fish were off-loaded in Alaska. This provisional settlement figure was subsequently adjusted after the sale of the fish, depending upon the actual sale price. Based on their experience with the accuracy of the provisional settlement figure over time, defendants used a percentage of the provisional settlement figure as their estimate of the value of the catch for crew member settlement purposes. This business practice was reasonable and resulted in proper payment to the crew.[5]

D. The Challenged Pay Practices Were Known or Discoverable by Plaintiffs Early On

Two of the plaintiffs, Fuller and Wilson, had worked aboard the Vessel previously, and were class members in an earlier lawsuit involving similar wage claims against the Vessel. Adamek v. Golden Age Fisheries, No. 89-1463R

[5] Plaintiffs' allegation that defendants kept a portion of the crew's share apparently refers to a bookkeeping procedure properly used by the defendants, whereby the Japanese broker was reimbursed for the salaries of Japanese technicians aboard the Vessel by assigning crewshares to the technicians.

(W.D. Wash. Stipulation and Order of Dismissal July 17, 1991). Therefore, Fuller and Wilson had actual knowledge that the pay practices challenged in this lawsuit were being questioned as early as November and December 1989, almost two full years before they filed suit in October 1991. All Adamek class members were informed of the issues when the notice of settlement was sent to the class in February 1991. In addition, the Adamek plaintiffs were represented by the same attorney who filed this lawsuit, and who knew of the challenged practices by the fall of 1989.

Plaintiffs note that Thayer was not a class member in the Adamek litigation. Nevertheless, Thayer candidly admitted at her deposition that prior to signing her third and last contract with the defendants, it was "common knowledge" among the crew that the Vessel's pay practices were being challenged in the Adamek litigation.

In any event, defendants did nothing to conceal the manner of calculating crewshares. Pricing information is confidential and sensitive in nature. Thus, it is shared with crew members only upon request, and is not mailed or handed out to crew members. Though the information is guarded, it is available to crew members, and is certainly not concealed.[6]

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[6] For example, when plaintiff Fuller requested accounting information, she received a letter from in-house counsel for the Vessel operators, offering to make such information available to her under proper conditions. Fuller discontinued her efforts to obtain the information after she learned of the filing of the Adamek lawsuit.

SUMMARY OF ARGUMENT

Two lower courts have analyzed the facts of this case and have determined that there is no genuine issue of material fact as to the enforceability of the limitation clauses contained in every employment contract signed by plaintiffs. These courts have held that there is no evidence of trickery, coercion, overreaching, or fraud surrounding the signing of these contracts. In fact, the Ninth Circuit applied the legal standard advocated by plaintiffs for the review of the limitation provisions, and came to the conclusion that these clauses should be enforced against these plaintiffs. The court of appeals decision is consistent with the decisions of this Court.

The Ninth Circuit also held that in enacting 46 U.S.C. § 10602, Congress directly addressed plaintiffs' in rem cause of action against the Vessel, and placed a six-month time limit upon the assertion of that claim. Under this Court's holding in Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978), because the claim has been directly addressed by Congress, Section 10602 provides plaintiffs' exclusive in rem cause of action. Plaintiffs are not free to bring an in rem claim that disregards Congress' procedural limitation. Plaintiffs' Request for a Writ of Certiorari should be denied.

ARGUMENT

I. The Decision of the Ninth Circuit Court of Appeals Enforcing the Contractual Limitation Clauses Is Consistent With Decisions of This Court and the Lower Federal Courts

It is undisputed that plaintiffs' lawsuit was filed long after the six-month limitation periods imposed by their employment contracts had expired. The only issue with regard to the contractual limitation clauses is whether they are enforceable against plaintiffs in this case. Plaintiffs assert that the clauses should not be enforced against them, solely because of their position as seamen. The Ninth Circuit Court of Appeals held, consistent with the decisions of this Court and the lower federal courts, that under the facts of this case the clauses are fully enforceable and plaintiffs' claims are barred.

A. Contractual Limitation Clauses Are Enforceable Against Seamen

The respective rights and obligations of crew members and their employers are governed by the crew members' employment contracts. McDonald v. United States, 292 F. 593, 594 (2d Cir. 1923); The Joseph B. Thomas, 148 F. 762, 764 (3d Cir. 1906). As the Joseph B. Thomas court stated:

> [I]n making their contracts, [crew members] are not to be exempted from contractual obligations freely and fairly made, and as to which no suspicion of misunderstanding or imposition attaches. Their service on shipboard is regulated by contract, express or implied, and the relation between them and the master of the ship is largely, if not altogether, a contractual one.

148 F. at 764. In fact, federal law requires that crew members on fishing vessels enter into written employment agreements. 46 U.S.C. § 10601. See infra at 16. Unless there has been overreaching, or a term of the agreement is contrary to law, crew members' employment agreements are enforceable. McDonald, 292 F. at 595; Joseph B. Thomas, 148 F. at 764.

Consistent with this principle of law, employment contracts that specify the manner in which a seaman's rights may be enforced have been upheld by courts, even where such decisions effectively bar a seaman's wage claim. E.g., The Joseph B. Thomas, 148 F. at 763-66 (contract provided that crew would not bring wage claims while vessel was detained by ice); Camean v. The F/V Lady Jay, 654 F. Supp. 709 (D. Mass. 1985) (seaman failed to pursue grievance procedure set forth in employment contract, barring breach of contract action); Collins v. Alaska, 621 F. Supp. 722 (W.D. Wash. 1985), aff'd, 823 F.2d 329 (9th Cir. 1987) (crew member agreement replaced traditional maritime personal injury remedies with workers' compensation scheme).

In Lauritzen v. Larsen, 345 U.S. 571 (1953), this Court upheld a choice of law provision in a seaman's employment contract, which had the effect of denying Jones Act coverage for an injury suffered at sea. The Court stated: "Except as forbidden by some public policy, the tendency of the law is to apply in contract matters the law which the parties intended to apply." 345 U.S. at 588-89.[7]

B. The Contractual Limitation Clauses in This Case Are Not the Product of Trickery, Coercion, Overreaching or Fraud

Despite the colorful language used in plaintiffs' petition, plaintiffs' complaint does not even allege trickery, coercion, overreaching or fraud. Nor does any factual support exist for such allegations. There is no evidence that

[7] Although the defendants are not aware of a reported case addressing the enforceability of a time limitation clause in a seaman's contract, federal courts routinely uphold such time limitation clauses in other admiralty contexts. For example, in personal injury suits brought by passengers against cruise ships, courts uphold time limitation clauses contained in passengers' tickets, so long as the limitation was reasonably communicated to the passenger and was not unreasonable or fundamentally unfair. Dempsey v. Norwegian Cruise Line, 972 F.2d 998, 999 (9th Cir. 1992); Coleman v. Norwegian Cruise Lines, 753 F. Supp. 1490 (W.D. Mo. 1991). Courts also enforce limitation clauses contained in bills of lading, even where a federal statute provides for a longer limitation period. E.g., Schnell v. United States, 30 F.2d 676 (2d Cir.), cert. denied, 279 U.S. 858 (1929) (three-month limitation period contained in bill of lading upheld despite applicable Admiralty Act two-year statute of limitation). In any event, there is no principled distinction between enforcement of a contractual time limitation clause and enforcement of other procedural or remedial limitations provided by contract.

plaintiffs were pressured into signing their employment contracts. To the contrary, plaintiffs are competent, educated individuals who either read or had an adequate opportunity to read their employment contracts.

It was defendants' usual practice to hold orientation sessions for each new employee, and to go over each provision of the employment contract. Although plaintiffs make much of the fact that no questions were asked regarding the limitation clauses contained in the contracts, it is undisputed that plaintiffs had the opportunity to ask such questions, but chose not to do so. It is also undisputed that most plaintiffs were offered copies of the contracts and simply chose not to take them. Plaintiffs understood the plainly worded limitation clauses, which were not hidden in fine print.

Both the district court and the Ninth Circuit Court of Appeals held that there was no evidence of fraud or overreaching in this case. There is no inconsistency between the Ninth Circuit decision and the decisions of this Court. In fact, in evaluating the circumstances surrounding the signing of the contracts, the court of appeals relied primarily on Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942), a case cited by the plaintiffs, which requires that a seaman's release of all claims be executed freely, without deception or coercion, that it be made by the seaman with a full understanding of his rights, and that it be fair to the seaman. Appendix A at A-11 - 12 (citing Garrett, 317 U.S. at 248).

Plaintiffs cannot argue that the court of appeals adopted an incorrect legal standard. Instead, they assert that the court failed to apply that standard properly to the facts of this case. However, the Ninth Circuit specifically noted the factual circumstances of this case which led it to conclude that the plaintiffs had failed to present a genuine issue of material fact with regard to the contract signing process. The court noted the education and experience of the plaintiffs, their ability to read and understand the employment contracts, and the opportunity given the crew members to review and discuss the contracts prior to signing them. In short, the court found "no evidence of overreaching." Appendix A at A-12.[8]

C. The Six-Month Limitation Is Neither Unfair Nor Unreasonably Short

The Ninth Circuit also held that the six-month time limitation was neither unfair nor unreasonable, noting that Congress has made the determination that six months is a proper limitation period for in rem wage claims brought

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[8] Even if the contract signing process had not met the standard for review of crew member contracts articulated in Garrett, the Ninth Circuit decision would still be correct. Plaintiffs have overstated the degree of protection to which they are entitled by relying exclusively on cases such as Garrett involving the release of substantive rights. See Plaintiffs' Petition at 22-23, and cases cited therein. The contract clauses in this case, however, merely place a procedural limit on the time period in which plaintiffs may exercise their right to bring a wage claim, and do not in any way constitute a release of a substantive right.

against a fishing vessel. Appendix A at A-13 (citing 46 U.S.C. § 10602). If six months is a reasonable limitation period for a seaman's statutory in rem wage claim, it is equally reasonable for the plaintiffs' other wage claims in this case. This is particularly true because a seaman's in rem wage claim, which allows the seaman to place a lien on the vessel itself, is considered his best and most favored remedy. See The John G. Stevens , 170 U.S. 113 (1898).[9]

Six months was certainly enough time for the plaintiffs to decide whether to bring a wage claim in this case. Crew members were paid within two to four weeks after the conclusion of each fishing trip. Under the terms of the limitation clauses, the six-month period began to run with this payment, giving the plaintiffs six full months after receipt of their wages in which to obtain additional accounting information and compare notes with workers on other vessels to determine whether they might have been underpaid. This is precisely how the Adamek plaintiffs came to believe that they had a wage claim against the defendants, and they asserted their claims within the six-month limitation period.[10]

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[9] Courts also routinely enforce six-month limitation clauses in employment contracts. E.g., Myers v. Western-Southern Life Ins. Co., 849 F.2d 259 (6th Cir. 1988) (former employee's civil rights action barred by six-month limitation clause in employment agreement); Beeson v. Schloss, 183 Cal. 618, 192 P. 292 (1920) (action for commissions by former salesman barred by six-month contractual limitation clause).

[10] Under one of the two versions of the limitation clause, something less than the actual filing of a lawsuit, such as a written claim against the defendants, might have tolled the six-month provision. At a

Moreover, each of the named plaintiffs in this case either knew or should have known all information necessary to bring suit well within the six-month time period. Two of the three named plaintiffs, Fuller and Wilson, were class members in the prior Adamek litigation. Plaintiffs assert in their petition that Fuller and Wilson had no knowledge of a potential claim against the defendants until receipt of their Adamek settlement checks in November 1991. See Plaintiffs' Petition at 16. However, these two plaintiffs both testified at deposition that they had actual knowledge that the pay practices challenged in this lawsuit were being questioned as early as November and December 1989, almost two years prior to the filing of this suit. In addition, all Adamek class members were certainly informed of the issues when the Adamek notice of settlement was sent to the class in February 1991, nine months prior to receipt of the settlement checks.

Furthermore, plaintiffs must be charged with constructive knowledge, because as class members they were represented by the same lawyer who filed this lawsuit, and who knew of the challenged practices by the fall of 1989. Deering v. Holcomb, 26 Wash. 588, 597, 67 P. 240 (1901) (knowledge by plaintiff's attorney of facts sufficient to put him on notice of fraud constituted constructive notice to plaintiff sufficient to start statute of limitations). Plaintiff Thayer, who was not a class member in the Adamek litigation, has candidly admitted that before signing her third

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minimum, plaintiffs could have made such a written claim or complaint, yet failed to do so.

and last contract with the defendants, it was "common knowledge" that the Vessel's pay practices were being challenged in court.[11]

The court of appeals properly enforced the contractual limitation clauses in this case. Plaintiffs' petition should be denied.

II. The Decision of the Ninth Circuit Court of Appeals That 46 U.S.C. § 10602 Provides Plaintiffs' Exclusive In Rem Cause of Action Is Consistent With the Decisions of This Court

A. 46 U.S.C. § 10602(a) Bars Plaintiffs' In Rem Claims on Its Face

As discussed above, the contractual limitation clauses bar all of the claims brought by the plaintiffs in this case, both in personam and in rem. Plaintiffs' in rem claims are also barred by statute.

46 U.S.C. § 10601(a) requires fishing vessels and fish processing vessels to make a written agreement with each seaman employed on board the vessel. Each agreement must be signed by the vessel's owner and must include certain terms of the seaman's employment. 46 U.S.C. §§ 10601(b)

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[11] Plaintiffs also assert that the six month time period was unreasonably short because it did not give them sufficient time to obtain detailed accounting information from the defendants, implying that such information was necessary prior to filing suit against defendants. However, plaintiffs did not need detailed accounting information prior to asserting their claims -- they filed this suit without such information, as did the Adamek plaintiffs before them.

and (c). Section 10602(a) then provides for an in rem action against the vessel to recover for a share of the ship's proceeds due under the written agreement. However, this action is subject to a six-month time limit:

> When fish caught under an agreement under section 10601 of this title are delivered to the owner of the vessel for processing and are sold, the vessel is liable in rem for the wages and shares of the proceeds of the seamen. An action under this section must be brought within six months after the sale of the fish.

46 U.S.C. § 10602(a) (emphasis added). Plaintiffs' in rem claims were filed too late and are barred by the statute.

B. 46 U.S.C. § 10602(a) Provides Plaintiffs' Exclusive In Rem Cause of Action

Plaintiffs do not dispute that their complaint was filed more than six months after the sale of the fish, nor do they dispute that their in rem claims are barred by the statute's language. Rather, they contend that the statutory limitation does not apply to them because their claim was brought not under Section 10602, but instead under "general maritime law." This assertion is incorrect because Section 10602(a) provides plaintiffs' exclusive in rem remedy.

1. In Section 10602(a), Congress Has Specifically Addressed the Liability of a Vessel In Rem for the Wages and Shares of a Fisherman

Any non-statutory in rem claim for unpaid wages that existed prior to the enactment of 46 U.S.C. § 10602 was preempted by Congress' creation of the statutory in rem action, and its expansion of that statutory cause of action in 1988. The court of appeals correctly followed this Court's decisions in City of Milwaukee v. Illinois, 451 U.S. 304 (1981) and Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978), in holding that Section 10602 provided plaintiffs with their exclusive in rem cause of action.

In cases involving federal statutory preemption of federal common law, a court should

> "start with the assumption" that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law.

City of Milwaukee, 451 U.S. at 317. Beginning with this assumption, the court then assesses whether a statute "speaks directly to" or addresses a question previously governed by federal common law. City of Milwaukee, 451 U.S. at 314-315; Mobil Oil, 436 U.S. at 625. If so, then the statute preempts existing federal common law. Id. As this Court stated in Mobil Oil:

> [W]hen . . . [Congress] . . . does speak directly to a question, the courts are not free to "supplement" Congress' answer so thoroughly that the Act becomes meaningless.

436 U.S. at 625.

In Mobil Oil, an admiralty wrongful death case, the Court held that the plaintiffs were bound by the limitation of damages provision contained in the Death on the High Seas Act. 436 U.S. at 624-626. Because the Act preempted "general maritime law," the plaintiffs could not resort to general maritime law in order to recover additional damages not allowed by the Act. Id. This Court stated:

> There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted. In the area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries.

436 U.S. at 625 (emphasis added).

Congress, in Section 10602(a), has specifically addressed the liability of a vessel in rem for the wages and shares of a fisherman, and has imposed a six-month limit on the exercise of such a claim. This is exactly the same claim that plaintiffs attempt to assert in this case under general maritime law. Allowing a non-statutory in rem action to co-exist alongside the statutory in rem action would render

Section 10602 meaningless. Given the choice between a statutory in rem action subject to a six-month limitation period, and a non-statutory in rem suit free from such a limitation, few plaintiffs would choose to bring the statutory claim.

Anticipating this argument, plaintiffs assert that Section 10602 would retain meaning even in the presence of a non-statutory in rem action. Plaintiffs make this surprising argument by contending that it is the "special remedy" in Section 10602(b)(1) that gives meaning to Section 10602. Section 10602(b)(1) directs the vessel owner to provide an accounting of the fish sale, and provides a remedy should the shipowner fail to make the accounting. Plaintiffs speculate at length about possible legislative motives for the creation of the remedy set forth in Section 10602(b)(1). See Plaintiffs' Petition at 46-47. Such unsupported speculation is of little value in analyzing the statute, and was properly disregarded by the court of appeals.

A reading of the statute demonstrates that the Section 10602(a) provision for an in rem action gives this statute meaning, not the remedy for failure to make an accounting. This is evident from the language of Section 10602(b)(1) itself, which assumes, in its reference to "an action under this section," that an in rem action under Section 10602(a) is a prerequisite to the accounting requirement.[12]

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[12] Nor does Murray v. The Ferry-Boat F.B. Nimick, 2 F. 86 (W.D. Pa. 1880) support plaintiffs' theory. Murray held that a special statutory show cause procedure did not provide the exclusive method or manner by which a merchant seaman could exercise his in rem remedy.

2. Section 10602(c) Does Not Demonstrate Congressional Intent to Preserve a Non-Statutory In Rem Action

Section 10602(c) states:

> This section does not affect a common law right of a seaman to bring an action to recover the seaman's share of the fish or proceeds.

46 U.S.C. § 10602(c). Plaintiffs contend that by this section, Congress intended to preserve a non-statutory in rem cause of action, free of any procedural limitations, at the same time it was creating a statutory in rem cause of action, subject to a six-month limitation. Such a reading of the statute is illogical. The common sense meaning of Section 10602(c) is that the statute does not alter any existing remedies that might be available to the crew member other than the in rem action. A crew member would be free to bring, for example, an in personam action for wages upon either an oral or written contract. Section 10602(c) simply does not show a congressional intent to preserve a federal non-statutory in rem cause of action.

In contrast, Section 10602(a) does not contain an alternate procedure for exercising a remedy, but rather provides the substantive in rem remedy itself. Moreover, in Murray, unlike this case, the statute retained meaning despite the existence of a non-statutory in rem claim, because the statute provided a summary remedy that would be attractive to most merchant seamen. See Murray, 2 F. at 86-87.

3. No Affirmative Congressional Statement of Intent to Preempt Federal Common Law is Necessary For Section 10602 to Create an Exclusive In Rem Cause of Action

Plaintiffs imply that because this is a case involving seamen, the court of appeals should have presumed that Congress did not intend to create an exclusive in rem cause of action, absent a clear statement of congressional intent to the contrary. See Plaintiffs' Petition at 31-32 (citing Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952); Federal Marine Terminals, Inc. v. Burnside Shipping Co., 394 U.S. 404, 412 (1969)). However, the fact that Congress did not affirmatively state its intent to create an exclusive in rem cause of action is not dispositive, as neither Mobil Oil nor City of Milwaukee requires such a statement.

To the contrary, this Court held in City of Milwaukee that no "clear and manifest" statement of Congressional purpose is necessary to indicate federal statutory preemption of federal common law. City of Milwaukee, 451 U.S. at 315-317. Moreover, Isbrandtsen actually supports the Ninth Circuit's decision in this case because it provides an example in the admiralty context where no affirmative congressional statement of intent was required by this Court.

Isbrandtsen involved a suit by a seaman against his employer to recover wages. Isbrandtsen, 343 U.S. at 780. The employer sought to set off against the seaman's claim the

medical expenses of another crew member, because the medical expenses were due to injuries caused by the plaintiff. Id. This Court held that the setoff was not available, since Congress had preempted the field by passage of legislation that did not provide for a setoff as a defense to a seaman's claim for wages. Id. at 781-82, 788-89. Consistent with the principles later expressed by this Court in City of Milwaukee and Mobil Oil, Isbrandtsen held that federal common law was preempted by the federal statute, despite the absence of any affirmative congressional statement indicating an intent to preempt federal common law.[13]

Plaintiffs emphasize the allegedly narrow scope of Section 10602, arguing that Congress has not completely "occupied the field" in this case. However, in a case of federal statutory preemption of federal common law, the statute need not be comprehensive, and the field need not be completely occupied. See Mobil Oil, 436 U.S. at 625. The concept to which plaintiffs refer is utilized in cases involving federal preemption of state, not federal, law. In cases of federal-state preemption, because federalism concerns are present, a court should begin with the assumption that the

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[13] In the recent case of United States v. Texas, 113 S. Ct. 1631 (1993), this Court held that the federal Debt Collection Act did not preempt the federal government's common law right to collect prejudgment interest on debts owed to it by the states. Although deciding on the facts of that case that Congress had not "spoken directly to" the question addressed by the common law, this Court reaffirmed that no affirmative congressional statement is necessary in order to find federal statutory preemption of federal common law. 113 S. Ct. at 1634-35.

"historic police powers" of the states are not to be superseded by Congress unless it is the "clear and manifest purpose of Congress." City of Milwaukee, 451 U.S. at 316.

In cases involving federal statutory preemption of federal common law, however, the proper inquiry is whether a legislative scheme "speaks directly to" the remedy at issue. To the extent that a statute does speak directly to a particular issue, that issue is preempted by the federal statute, regardless of the comprehensiveness of the statute.[14]

The Ninth Circuit Court of Appeals correctly applied City of Milwaukee and Mobil Oil to hold that Section 10602 provides plaintiffs' exclusive in rem cause of action in this case.

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[14] The Ninth Circuit's decision in this case is not inconsistent with Federal Marine Terminals, Inc. v. Burnside Shipping Co., 394 U.S. 404 (1969). In Marine Terminals, Congress had not "spoken directly to" the question. The Marine Terminals court addressed whether an employer whose longshoreman employee was killed in the course of his employment was limited to a statutory subrogation remedy in seeking reimbursement from the vessel owner. 394 U.S. at 407. This Court held that the statutory subrogation right created by the Federal Longshoremen and Harbor Workers Compensation Act did not preclude the employer from pursuing other, different remedies available to it. Id. at 413-14. This is not the situation presented in the case at bar, where plaintiffs seek to pursue the same remedy provided by statute, but without the procedural limits imposed by Congress. Under such circumstances, Congress has spoken directly to the remedy by statute, and the statute provides the exclusive remedy.

CONCLUSION

The Ninth Circuit Court of Appeals decision in this case is consistent with the decisions of this Court and the lower federal courts, and needs no further review. Plaintiffs' petition for certiorari should be denied.

Dated this 23rd day of May, 1994.

Respectfully submitted,

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